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No. 86757-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

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JULIE PALMER, MICHAEL BALLEW, and LARRY G. WESTBERRY,  
Appellants,

v.

WASHINGTON STATE DEPARTMENT OF  
LABOR AND INDUSTRIES,  
Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
THE HONORABLE LISA L. SUTTON

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REPLY BRIEF OF APPELLANTS

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ARGUMENT IN REPLY .....	2
A.	DLI's Rule Is Unlawful For Several Independent Reasons. ....	2
1.	The Rule Violates Separation Of Powers Because The Record Shows It Was Enacted To "Immunize" The Trucking Industry From <i>Bostain</i> . ....	2
2.	DLI Admits That The Legislature Did Not Authorize The Agency To Make Factual Determinations Of "Reasonably Equivalent" Schemes. ....	7
3.	The Rule And The Factual Determinations Made Under The Rule Violate The APA And Due Process Because DLI Admits That The Affected Employees Receive No Notice And No Opportunity To Be Heard. ....	9
4.	Division II's Decision In <i>Westberry</i> Proves Why The Rule Violates Due Process And The APA. ....	14
B.	The Truck Drivers Have Standing To Challenge The Rule. ....	17
1.	The Truck Drivers Have Standing To Challenge DLI's Rule Creating A Procedure For Employers To Obtain An <i>Ex Parte</i> Retroactive Defense To Overtime Owed Under <i>Bostain</i> . ....	17

2.	DLI Knew Of The Lawsuit For Overtime Pay Under <i>Bostain</i> And Deliberately Did Not Give The Truck Drivers Notice Of Its Determination Proceedings So That IDC Could Use The <i>Ex Parte</i> Determination To Defeat Their Overtime Claim In Court. ....	19
C.	DLI Is Wrong About The Truck Drivers Retroactively Receiving Pay That Was “Reasonably Equivalent” To Overtime. ....	21
III.	CONCLUSION.....	25

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Bay Ridge Operating Co. v. Aaron</i> , 334 U.S. 446, 68 S.Ct. 1186, 92 L. Ed. 1502 (1948), <i>reh'g</i> <i>denied</i> , 335 U.S. 838.....	22
<i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed 2d 287 (1970).....	10
<i>Portland Audubon Soc. v. Endangered Species</i> <i>Committee</i> , 984 F.2d 1534 (9th Cir. 1993).....	11
<i>Walling v. Helmerich &amp; Payne</i> , 323 U.S. 37, 65 S.Ct. 11, 89 L. Ed. 29 (1944).....	22

### STATE CASES

<i>Association of Washington Business v. Dept. of</i> <i>Revenue</i> , 155 Wn.2d 430, 120 P.3d 46 (2005) .....	7
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007), <i>cert. denied</i> , 552 U.S. 1040 (2007).....	<i>passim</i>
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	23
<i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 563 P.2d 203 (1977).....	10-11, 15
<i>Impoundment of Chevrolet Truck</i> , 148 Wn.2d 145, 60 P.3d 53 (2002).....	9
<i>Magula v. Benton Franklin Title Co., Inc.</i> , 131 Wn.2d 171, 930 P.2d 307 (1997).....	6
<i>Malland v. DRS</i> , 103 Wn.2d 484, 694 P.2d 16 (1985).....	12, 15
<i>Matter of Shepard</i> , 127 Wn.2d 185, 898 P.2d 828 (1995).....	6

<i>McDaniel v. DSHS</i> , 51 Wn. App 893, 756 P.2d 143 (1988).....	10, 12, 15
<i>Schneider v. Snyder's Foods, Inc.</i> , 116 Wn. App 706, 66 P.3d 640, <i>rev. denied</i> , 150 Wn.2d 1012 (2003).....	12-13
<i>State v. Dupard</i> , 93 Wn.2d 268, 609 P.2d 961 (1980).....	12, 15
<i>Washington State Human Rights Comm. ex rel. Spangenberg v. Cheney School Dist. No. 30</i> , 97 Wn.2d 118, 641 P.2d 163 (1982).....	9
<i>Westberry v. Interstate Distributor Co.</i> , 164 Wn. App. 196, 263 P.3d 1251 (2011), <i>rev. pending</i> , No. 86789-5 .....	<i>passim</i>

## STATUTES

RCW 34.05.328 .....	7
RCW 34.05.530 .....	18
RCW 34.05.570 .....	11, 17
RCW 49.46.005 .....	22
RCW 49.46.130 .....	3-4, 7-8, 10, 13, 22

## RULES AND REGULATIONS

DLI Administrative Policy ES.A.8.3 .....	8
WAC 296-12-012.....	4, 7
WAC 296-128-011.....	4, 8, 24
WAC 296-128-012.....	7-8, 12

## OTHER AUTHORITIES

American Heritage Dictionary (1981) .....	23
Black's Law Dictionary (6th Ed. 1990).....	23
Koch, Admin. Law and Practice, §2:11 (3d. ed. 2010) .....	10
Wash. Admin. Law Practice Manual, Ch. 1, (Matthew Bender, Dec. 2011).....	10
William R. Anderson, <i>The 1988 Washington Administrative Procedure Act--An Introduction</i> , 64 Wash. L. Rev. 781 (1989).....	11

## I. INTRODUCTION

The DLI rule appellants challenge in this action violates separation of powers, because the record shows it was enacted to “immunize” the trucking industry from this Court’s decision in *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007), *cert. denied*, 552 U.S. 1040 (2007). DLI admits that the Legislature has not authorized it to make factual determinations of “reasonably equivalent” pay schemes, and the rule and the factual determinations made under the rule violate the APA and due process because DLI admits that the affected employees receive no notice and no opportunity to be heard. Division II’s decision in *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 263 P.3d 1251 (2011), *rev. pending*, No. 86789-5, proves why the rule violates due process and the APA, and why the truck drivers have standing to challenge the rule. Finally, DLI is wrong that the truck drivers retroactively received pay “reasonably equivalent” to overtime. This Court should strike down the challenged rule.

## II. ARGUMENT IN REPLY

### A. DLI's Rule Is Unlawful For Several Independent Reasons.

#### 1. The Rule Violates Separation Of Powers Because The Record Shows It Was Enacted To "Immunize" The Trucking Industry From *Bostain*.

DLI contends (without any record citations) that it did not intend to "circumvent the *Bostain* decision," but rather to "implement [ ]" it. DLI Br. 1, 6. DLI's own rulemaking record, however, disproves this assertion. The record shows that, after *Bostain*, DLI acted in complicity with the trucking industry to "immunize" the employers from overtime pay claims owed under *Bostain*, by allowing trucking companies to obtain, without notice to the affected employees, retroactive *ex parte* factual determinations that they had supposedly always paid the "reasonable equivalent" of overtime in their uniform mileage pay-rates. CP 183, 196, 197, 222 (described *infra* at 2-6; *see also* Opening Br. 11-14).

DLI retroactively determined that trucking companies were paying overtime even before the *Bostain* decision, even though *the trucking companies never thought that their interstate drivers were eligible for overtime and therefore never provided any additional pay for working in excess of 40 hours per week*. The trucking industry's counsel, Phil Talmadge, readily admitted this fact to DLI: "The carriers who relied on the WAC prior to the Court's decision [in *Bostain*] would not and could

not, ‘comply’ with the Court’s decision. The [*Bostain*] decision was an abrupt change in Washington law.” AR 197.<sup>1</sup>

The employers had never paid their interstate truck drivers any extra compensation for hours worked in excess of 40 hours per week because they contended that interstate drivers were never eligible for over-time because they never worked more than 40 hours a week within Washington. Indeed, the Washington Trucking Association (WTA), which submitted an amicus brief in this *Palmer* case as well as in the related *Westberry* case,<sup>2</sup> previously submitted an amicus brief in *Bostain*, explaining that its members did not pay overtime because the drivers were not eligible:

Truck drivers performing services in interstate commerce are entitled to overtime wages in Washington only if they work more than 40 hours per week within the state. *The hours those drivers work outside of Washington in a week are not part of the calculation for overtime* under RCW 49.46.130. (WTA Amicus Brief in *Bostain*, 2006 WL 1785267 (2006) at 19) (emphasis added)

WTA expanded on this explanation by reiterating that, prior to *Bostain*, its employer members simply did not include out-of-state hours in calculating the amount of overtime pay drivers were owed because those hours did not count toward overtime:

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<sup>1</sup> AR refers to the Administrative Record filed in the Superior Court in this case.

<sup>2</sup> Plaintiffs are seeking review in *Westberry*, Supreme Court No. 86789-5, asking that the cases be heard together. DLI refers to the *Westberry* case throughout its brief in *Palmer*. See DLI Br. p. v (Table of Authorities).

At least since the enactment of RCW 49.46.130(f) [in 1989] and the promulgation of WAC 296-128-011/WAC 296-128-012 [in 1989], WTA's members have only used in-state hours worked by interstate truck drivers to determine if a driver has worked 40 hours a week and is entitled to overtime. (WTA Amicus Brief in *Bostain*, 2006 WL 1785267 (2006) at 6)

Moreover, the appellants' own employer, Interstate Distributor Co. (IDC) admitted in the *Westberry* case when it sought removal to federal court that IDC never paid Westberry (or its other interstate truck drivers) any overtime pay. "Plaintiff [Westberry], a long-haul truck driver engaged in interstate commerce, *was not paid overtime.*" CP 81 (emphasis added).

The trucking industry needed DLI to create a retroactive defense because the Court in *Bostain* held that "whether paid under the time-and-a-half provisions of RCW 49.46.130(1) or by the 'reasonably equivalent' compensation, the statute [MWA] mandates that truck drivers must receive *extra compensation* for hours worked over 40 per week." *Bostain*, 159 Wn.2d at 710 (emphasis added). Consistent with the fact that the trucking companies had never paid overtime, the rulemaking record shows that DLI was not "implementing" *Bostain*, but rather working to implement the trucking industry's plan to "immunize" the trucking industry from what they called the "obvious unfairness of the Washington Supreme Court's *Bostain* decision." AR 197.

DLI thus enacted the rule challenged here to create a *retroactive defense* for employers to overtime pay owed under *Bostain*:

- “If such compensation systems are approved . . . this would likely immunize the carriers from lawsuits for back overtime wages.” (AR 184)
- Retroactive approval necessary because it “presumably would insulate those carriers from liability . . .” (AR 197)
- The proposed rule was intended to “provide [ ] a safe harbor for employers who relied on the WACs before *Bostain* . . . [the] ultimate goal is to make sure that the proposal does indeed provide a safe harbor to employers.” (AR 196)

As DLI’s counsel explained in the rulemaking, “*if they [the employers] get an ok from L&I, they can use the ok as a defense. If they don’t get an ok from L&I, then of course they are wide open to legal action.*” AR 222.

DLI’s Benefit Cost analysis concluded that DLI’s retroactive approvals would provide the employers with “*certainty*” that “*their compensation systems comply* with state law following *Bostain*.” AR 18 (emphasis added).

The facts in *Westberry* illustrate the trucking industry’s need for DLI’s assistance in creating a retroactive defense to the overtime already owed, because they showed the truck drivers never received any “extra compensation” for working over 40 hours per week as required by *Bostain*. IDC admitted that it paid its interstate truck drivers a flat mileage rate regardless of how many hours or miles they drove. CP 80: “IDC pays

its line-haul truck drivers (like Plaintiff Westberry) by the mile.” Westberry was paid 32 cents per mile, which equals \$16.00 per hour if he averaged 50 miles per hour. CP 80. IDC, like the other employers, never intended that the mileage-based pay for its interstate truck drivers included additional compensation because in the employers’ view the drivers were not eligible for overtime. Indeed, IDC straightforwardly admitted that “Plaintiff [Westberry], a long-haul driver engaged in interstate commerce, *was not paid overtime.*” CP 81 (emphasis added). Thus, IDC needed DLI’s assistance in retroactively “determining” that Westberry’s mileage-based pay of approximately \$16 per hour had always included additional pay for overtime, when in fact his pay *never* included any additional compensation for hours worked in excess of 40 per week.

Because the record shows that DLI’s rule allowing retroactive *ex parte* approvals of supposedly “reasonably equivalent” overtime pay was adopted to circumvent the Supreme Court’s decision in *Bostain*, it is invalid and violates the separation of powers. *Matter of Shepard*, 127 Wn.2d 185, 193, 898 P.2d 828 (1995) (“[T]he Court will not enforce retroactive amendments used to circumvent a judicial opinion.”); *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997) (retroactive amendment violates separation of powers).

**2. DLI Admits That The Legislature Did Not Authorize  
The Agency To Make Factual Determinations Of  
“Reasonably Equivalent” Schemes.**

DLI’s rule is also invalid because DLI admittedly had no legislative authority to set up a factfinding process to determine whether an employer’s pay scheme is “reasonably equivalent” to overtime. DLI admits that it has “no express rulemaking authority pertaining to the reasonably equivalent exemption from overtime, RCW 49.46.130(2)(f).” DLI Br. 32. DLI therefore agrees that WAC 296-12-012 is not a legislative rule, but it contends that its lack of such authority does not matter because it has implied authority to issue “interpretive rules.” DLI Br. 32.

Interpretive rules, however, only offer an agency’s interpretation of statutes, and they are not binding. *Association of Washington Business v. Dept. of Revenue*, 155 Wn.2d 430, 443-47, 120 P.3d 46 (2005) (“[Interpretive rules] are not binding on the courts and are afforded no deference other than the power of persuasion.”<sup>3</sup> WAC 296-128-012 is not an interpretive rule because it does not interpret a statute. RCW 34.05.328(5)(c)(ii) (an “‘interpretive rule’ . . . sets forth the agency’s interpretation of statutory provisions it administers.”). DLI expressly

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<sup>3</sup>DLI cites *Ass’n. of Wash. Bus. v. Dept. of Revenue*, 155 Wn.2d 430, 445-47, 120 P.3d 46 (2005) to contend that its rule “is an interpretative rule that is entitled to deference.” DLI Br. 29. But the *AWB* case actually holds the opposite, *i.e.*, “[interpretive rules] . . . are afforded no deference.” 155 Wn.2d at 447.

acknowledges that its rule does not interpret a statute. Instead it sets forth a procedure by which the agency purports to determine facts:

After it receives a request for evaluation of a company's compensation system, L&I will determine whether the compensation system is reasonably equivalent under all requirements of RCW 49.46.130(2)(f) and WAC 296-128-011 and -012. *L&I's determination* is an agency interpretation of *whether the facts under review comply* with RCW 49.46.130(2)(f), considering L&I's specialized expertise in this area.

DLI Administrative Policy ES.A.8.3, AR 381 (emphasis added). DLI admitted the rule was intended to facilitate fact-finding in its briefing below: "L&I's determination is an agency interpretation of *whether the facts under review comply* with RCW 49.46.130(2)(f), considering L&I's specialized expertise in this area." CP 126 (emphasis added).

DLI's "reasonably equivalent determinations" for IDC also demonstrate on their face that DLI is not interpreting the statute, but determining facts.<sup>4</sup> CP 49-50, 69-70, 72, 74. DLI's rule therefore is not

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<sup>4</sup> For example, DLI "determined" these facts for IDC:

"IDC's compensation system is reasonably equivalent for its line haul drivers who are paid on a mileage plus load/unload basis when compared to the amount they would be paid if they had been paid on an hourly rate. Drivers will typically receive greater compensation under this plan than if they were paid straight time for hours worked up to 40 per week and one and one-half times the regular rate of pay for hours worked in excess of 40 hours per week under RCW 49.46.130(1). IDC's compensation system is reasonably equivalent to the time and one-half requirement under RCW 49.46.130."

CP 50.

actually an interpretive rule, but is, instead, an unauthorized factfinding procedure. And because the rule creating a factfinding procedure is not authorized by the Legislature, it is invalid. *Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156-59, 60 P.3d 53 (2002) (rule establishing a procedure for mandatory impoundment of vehicles was invalid without legislative authorization); *Washington State Human Rights Comm. ex rel. Spangenberg v. Cheney School Dist. No. 30*, 97 Wn.2d 118, 130, 641 P.2d 163 (1982) (rule establishing a remedy for discrimination was invalid because it was not authorized by the Legislature).

**3. The Rule And The Factual Determinations Made Under The Rule Violate The APA And Due Process Because DLI Admits That The Affected Employees Receive No Notice And No Opportunity To Be Heard.**

DLI also concedes every element that shows its rule and the *ex parte* factual determinations established by the rule violate the Administrative Procedures Act (APA) and due process. DLI agrees that the agency did not provide the affected employees with notice and an opportunity to be heard. DLI Br. 44-45; *see also* IDC's Answer to Petition for Review in *Westberry*, No. 86789-5 at 16 ("Any perceived right to participate in DLI's reasonably equivalent determination process *Westberry* may harbor is imagined."). Notice and opportunity to be heard are required both by the APA and by due process whenever an agency

makes factual determinations that affect the rights of specific individuals. *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed 2d 287 (1970); *McDaniel v. DSHS*, 51 Wn. App 893, 897-98, 756 P.2d 143 (1988).

“Adjudications” occur when agencies “use the information they have gathered or that has been supplied to them to make decisions that directly affect individuals and often thereafter affect statutorily or constitutionally protected interests.” Wash. Admin. Law Practice Manual, Ch. 1, §1.03[E] (Matthew Bender, Dec. 2011). “In general adjudication is the decisionmaking process for applying preexisting standards to individual circumstances.” “Thus the result of adjudication is the resolution of an individual controversy.”<sup>5</sup> Koch, Admin. Law and Practice, §2:11, p. 70 (3d. ed. 2010).

DLI contends “the Department’s determinations concerning whether an employer’s compensation system is reasonably equivalent . . . is not an adjudication.” DLI Br. 40. But DLI admits that its reasonably equivalent “*determination* is an agency interpretation of *whether the facts under review comply* with RCW 49.46.130(2)(f).” CP 126; AR 381

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<sup>5</sup> In contrast to an adjudication, an agency engages in rulemaking when it “formulates a general policy that is intended to set future standards of behavior[.]” Wash. Admin. Law Practice Manual, §1.03[C]. “Rulemaking is [thus] a determination of general applicability and predominately prospective effect.” Koch, Admin. Law and Practice, *supra*, at 70.

(emphasis added). And DLI's determinations for IDC expressly decided facts. CP 49-50, 69-70, 72, 74; *see, e.g.*, n. 4 on p. 8, *supra*.

Therefore, DLI's only "defense" to its violation of the APA's procedural requirements for adjudications is its bare assertion that the *ex parte* factual determinations regarding the truck drivers working for IDC "are not adjudications." DLI Br. 39. But determining facts is an adjudicatory function. *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1540-41 (9th Cir. 1993) (decision "whether to grant or deny specific requests for exemptions based upon specific factual showings" was adjudication); William R. Anderson, *The 1988 Washington Administrative Procedure Act--An Introduction*, 64 Wash. L. Rev. 781, 789 (1989). And DLI simultaneously (and inconsistently) contends that even though its *ex parte* "determinations" are "not adjudications," the courts may "give deference to [ ] a Department determination concerning whether a company's compensation system is reasonably equivalent." DLI Br. 39. Indeed, Division II in *Westberry* reviewed the DLI "determinations" concerning IDC's drivers under the deferential "arbitrary and capricious" standard for review for reviewing adjudication decisions. *Westberry*, 164 Wn. App at 207; RCW 34.05.570(3)(i).

Courts defer to an agency's factual determinations only when they comport with the APA and due process. *Esmieu*, 88 Wn.2d at 497;

*McDaniel*, 51 Wn. App at 897-98; *Malland v. DRS*, 103 Wn.2d 484, 490-91, 694 P.2d 16 (1985); *State v. Dupard*, 93 Wn.2d 268, 274, 609 P.2d 961 (1980). DLI admits its “determinations” did not meet the basic elements of due process and the APA — notice and an opportunity to be heard. DLI Br. 44-45.

DLI further concedes that the affected drivers did not even receive the limited “notice” called for in its own rule. The rule states that “an employer may, with notice to a truck or bus driver subject to the provisions of Federal Motor Carrier Act, establish a rate of pay that is not an hourly basis and that includes in the rate of pay compensation for overtime.” WAC 296-128-012(a). But DLI says its “rule does not explicitly identify notice of what.” DLI Br. 34. Thus, according to DLI, the only “notice” that the employees need receive is that they are being paid – not that their pay supposedly includes compensation for overtime. DLI’s “notice” argument is inconsistent with WAC 296-128-012 (notice required that a pay rate “includes . . . compensation for overtime”) and would make the “notice” provision of its rule meaningless.

To support their reliance on DLI’s determinations on IDC and the *Westberry* court’s “deference” to them, both IDC and DLI rely on *Schneider v. Snyder’s Foods, Inc.*, 116 Wn. App 706, 66 P.3d 640, *rev. denied*, 150 Wn.2d 1012 (2003). IDC Ans. To Pet. For Rev. 13-16;

DLI Br. 25, 39. In *Schneider*, a class action, a collective bargaining agreement established that the employer would pay “additional compensation for those Route Salespersons who work more than (40) hours per week.” 116 Wn. App at 711. The route salesmen and the employer *agreed* to submit the collective bargaining agreement to DLI for a determination of whether the CBA provided additional pay for overtime that was reasonably equivalent to the overtime required by the MWA, RCW 49.46.130(1). The parties submitted evidence and arguments to the DLI’s compliance officer, who “*considered the material and evidence submitted by both parties.*” *Schneider*, 116 Wn. App at 717 (emphasis added).

In contrast to the employees in *Schneider*, who agreed to have DLI determine the facts, had notice and an opportunity to be heard, and were represented by the union and class counsel, Palmer and the other IDC truck driver employees who were the subject of DLI’s retroactive overtime determinations were given no notice and opportunity to be heard by DLI. Indeed, this lack of notice and opportunity to be heard was intentional on DLI’s part. *See* Arg. § B.2, *infra*, at 19.

Determination of facts is factfinding, an essential adjudicative function. Factfinding by an agency requires compliance with the APA and due process, including notice and an opportunity to be heard. DLI

concedes it did not provide the affected employees with notice and opportunity to be heard.

**4. Division II's Decision In *Westberry* Proves Why The Rule Violates Due Process And The APA.**

The courts in both this case and *Westberry* erroneously gave “deference” to factfinding that not only was never authorized by the Legislature and intended by DLI to circumvent *Bostain*, but which was also conducted *ex parte*, without notice, and without taking any evidence. As argued above and in the *Westberry* Petition for Review at 15, this violated the APA and due process.

DLI argues that those “determinations” really were “just an opinion,” treated as nonbinding by Division II, and thus appellants are supposedly not harmed by the “nonbinding” determinations. DLI Br. 41-42. These claims are false. As the WTA’s *amicus* memorandum in *Westberry* explains, “the Court of Appeals [in *Westberry*] simply affirmed the Department’s factual determination that [IDC] *did in fact pay proper overtime to its drivers.*” WTA Amicus Brief in *Westberry*, No. 86789-5, p. 1. Division II did exactly that, explicitly basing its decision on DLI’s “determinations” regarding IDC, 164 Wn. App. at 206-08, and specifically rejecting *Westberry*’s argument that DLI’s “determination” was “just an opinion.” *Westberry*, 164 Wn. App. at 203.

Division II also stated, entirely incorrectly, that “Westberry does not argue, and the record does not suggest, that L&I’s review of Interstate’s submitted materials [*i.e.*, IDC’s letters to DLI, *not* evidence] was in any way deficient.” *Westberry*, 164 Wn. App. at 208. The truck drivers *in both the Westberry and Palmer proceedings* contend DLI’s process was thoroughly and fundamentally “deficient,” in that DLI unlawfully conducted an improper factfinding process by way of *ex parte* correspondence with the employer, IDC, without any notice to its employees and without giving the employees any opportunity to be heard. *Palmer*, CP 14-15; 104-108; 110-12; 149-55; *Westberry*, CP 291-92; 303-04. *See Malland v. DRS*, 103 Wn.2d at 490-91; *State v. Dupard*, 93 Wn.2d at 274; *Esmieu v. Schrag*, 88 Wn.2d at 497; *McDaniel*, 51 Wn. App at 897-98.

DLI contends that Westberry lost his case only because he “failed to present facts opposing those offered by IDC.” DLI Br. 41-42; *see also* IDC Answer to Petition for Review 2-3. But these arguments are simply false. IDC submitted *no* testimony *whatsoever* in *Westberry* to the Superior Court on the matter of compliance with the overtime statute other than the first Trueblood Declaration, in which IDC admitted: “Plaintiff, a long-haul truck driver engaged in interstate commerce, ***was not paid overtime.***” CP 81 (emphasis added). At summary judgment, IDC submitted a second Trueblood declaration reciting a few additional facts about

Westberry's employment, without discussing either overtime requirements or her earlier declaration with IDC's admission that Westberry was not paid overtime. The second Trueblood declaration then without explanation attached the DLI "record" of determinations as "true and accurate . . . cop[ies]" of DLI's determination letters and the IDC letters submitted to DLI to obtain DLI's determination "letters." CP 30-35.

IDC's motion for summary judgment in *Westberry* thus was based *solely* on the argument that DLI's retroactive *ex parte* factual determinations on IDC's pay scheme had preclusive effect on Westberry. IDC argued DLI "has approved IDC's compensation system (both pre and post-*Bostain*) for its Washington line-haul drivers as 'reasonably equivalent' to the overtime requirements of the MWA . . . [Therefore] any such claim [like Westberry's for overtime pay] would fail as a matter of law." *Westberry*, CP 234. IDC asserted that the trial court should hold that DLI's "determinations" had "*already*" decided the overtime pay issues: Interstate's "compensation scheme has already been determined to comply with the MWA;" *Westberry* CP 311, *accord*, CP 312: DLI "has approved [Interstate's] pre- and post-*Bostain* compensation system as legally compliant with the MWA and controlling regulations." The trial court in *Westberry* agreed that the determinations were dispositive. CP 77.

IDC's own evidence contained in the first Trueblood Declaration admitting that Westberry was not paid overtime would create a material issue of fact that would have precluded summary judgment if the court had not considered the DLI determinations dispositive of the factual issues. IDC never explained how its pay for Westberry, that expressly *never* included any compensation for overtime when it was earned, supposedly *always* included compensation for overtime for actual hours he worked in excess of 40 per week. Thus, contrary to DLI's argument, Division II erroneously treated the "determinations" by DLI as though they were the outcomes of adjudication that in court are entitled to receive the limited APA standard of review for "arbitrary and capricious" decisions. *Westberry*, 164 Wn. App. at 207, 208, ¶¶18, 19, 22; RCW 34.05.570(3)(i). Division II improperly deferred to DLI's retroactive "interpretation" of the *facts* regarding Westberry's period of employment at IDC, not of a statute on regulation. 164 Wn. App. at 206-09.

**B. The Truck Drivers Have Standing To Challenge The Rule.**

**1. The Truck Drivers Have Standing To Challenge DLI's Rule Creating A Procedure For Employers To Obtain An *Ex Parte* Retroactive Defense To Overtime Owed Under *Bostain*.**

Despite the clear consequence of the rule and the retroactive determinations of reasonable equivalency made under it, the trial court concluded that Palmer, Ballew, Westberry and other affected interstate

truck drivers lacked standing to challenge the rule because they were not injured. CP 303. There are three conditions to standing under the APA:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; *and*
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530. Appellants meet all three conditions.

First, the rule prejudiced Palmer, Ballew, Westberry and the other affected truckers. Indeed, DLI admitted that the purpose of the rule was to allow the trucking industry employers to obtain, in *ex parte* proceedings, a factual “defense” to overtime compensation owed under *Bostain*, and without that defense, “they [the employers] are wide open to legal action.” AR 222. Enacting a rule to allow employers to obtain *ex parte* defenses to employee overtime claims, particularly retroactive factual defenses, is plainly prejudicial to the employees. And in fact, DLI intended that the employers would use DLI’s retroactive *ex parte* factual determinations to defeat the employees’ overtime pay claims. AR 222, 183, 196, 197. DLI’s *ex parte* “factual determination” process worked just as DLI and the employers intended, “immunizing” IDC in Westberry’s case from overtime pay owed under *Bostain* and the MWA. Indeed, DLI’s *ex parte*

“factual determinations” for IDC were the sole basis for the trial and the Court of Appeals’ decisions in *Westberry*.

Second, the interstate truck drivers’ interests certainly are among those that DLI was required to consider. Indeed, the trial court expressly found that *Westberry* was a “stakeholder” whose interest DLI was required to consider. CP 320. Although the rulemaking file shows DLI ignored the uniform opposition of employee representatives to the rule, DLI admits that it was required to consider the truckers’ interest. AR 160-56; 133-37, 114-118, 119, 121, 132, 142-51, 207, 222.

Finally, if DLI’s rule is unauthorized and invalid, DLI’s retroactive, *ex parte* determinations established under the rule are accordingly invalid, and the truckers’ employer IDC could not rely upon agency factual determinations of “reasonable equivalency” in the *Westberry* litigation. This would eliminate the prejudice identified as the first requirement of standing.

**2. DLI Knew Of The Lawsuit For Overtime Pay Under *Bostain* And Deliberately Did Not Give The Truck Drivers Notice Of Its Determination Proceedings So That IDC Could Use The *Ex Parte* Determination To Defeat Their Overtime Claim In Court.**

DLI also contends that Palmer and all other truck drivers lack standing to challenge the rule establishing DLI’s retroactive *ex parte* determinations because they did not appeal within 30 days from DLI’s

reasonably equivalent determination decision in favor of IDC. DLI Br. 49. DLI does not dispute, however, that it failed to provide Palmer and the other truck drivers with notice and opportunity to participate in its IDC determination. DLI Br. 44-45. *See also* IDC Ans. to Pet. for Review in *Westberry* at 16: “Any perceived right to participate in DLI’s reasonably equivalent determination process *Westberry* may harbor is imagined.”

DLI did not provide Palmer and the other IDC truck drivers with notice and opportunity to be heard not due to inadvertence, but rather as part of DLI’s deliberate strategy to assist the trucking industry by establishing for them a defense to overtime owed under *Bostain*. DLI knew that the IDC employees had brought suit to obtain overtime pay owed under *Bostain* before it made its reasonably equivalent determinations in favor of IDC.<sup>6</sup>

Thus, although DLI knew that the IDC interstate truckers were trying in court to obtain overtime pay owed under *Bostain*, DLI deliberately did not give notice to the affected employees. DLI did not do so because it wanted to assist in creating a retroactive defense that IDC

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<sup>6</sup> DLI’s rulemaking file contains copies of the *Westberry* class action complaint for overtime pay owed by IDC under *Bostain*. AR 237-239, 252-254. The *Westberry* class action complaint is attached to a briefing memo about DLI’s proposed rule to create *ex parte* retroactive defenses to *Bostain* for employers of truckers and in the *Westberry* class action case. AR 231-43. Seven different DLI officials received the memo, including DLI’s counsel, Director, Deputy Director, and in the Program Manager who signed the IDC determination. AR 230.

could use to prevent the employees from receiving the overtime pay owed under *Bostain*. AR 222. And DLI's procedure worked just as DLI intended. The first time that Westberry learned of DLI's *ex parte* retroactive determination was when IDC successfully used it in court as a defense in Westberry's case.<sup>7</sup> DLI knew of the truck drivers' lawsuit for overtime pay under *Bostain* and deliberately did not give them notice of its determination proceedings so that their employer could use the *ex parte* determination to defeat their overtime pay claim in court.

**C. DLI Is Wrong About The Truck Drivers Retroactively Receiving Pay That Was "Reasonably Equivalent" To Overtime.**

Without expressly saying so, DLI makes a sort of harmless error argument, *i.e.*, that the agency's reasonably equivalent determinations were right, because the truck drivers would "twice receive a premium for

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<sup>7</sup> Westberry's counsel learned about DLI's proposed rule in June 2008 and was told by DLI that he had to make public records requests to obtain DLI documents pertinent to the rulemaking. AR 45. Counsel followed this directive and made a series of public record requests, including one for a list of trucking companies that have implemented a "reasonably equivalent compensation plan approved by L&I." AR 312. On June 25, 2008 DLI told counsel that "*We have 2 requests for review and approval pending. We cannot release any more information until the decisions have been made.*" AR 311. Counsel asked what basis DLI had for withholding the determination requests. CP 311. DLI then identified IDC as one of the two companies and later agreed to provide IDC's request. AR 310. DLI sent Westberry IDC's determination request, made on December 13, 2007, on July 14, 2008. AR 315, CP 53. After receiving IDC's request to DLI, Westberry's counsel objected to the *ex parte* process on July 18. But unbeknownst to Westberry and his counsel, that same day DLI determined that IDC's pay scheme was reasonably equivalent for the current period. CP 49. It later made its retroactive determination in May 2009. CP 69-70, 72.

hours worked over 40 per week.” DLI Br. 1. Setting aside that a harmless error analysis does not apply when the rule it was operating under is invalid, DLI is wrong about the pay issue as well.

The Court held that “whether paid under the time-and-a-half provisions of RCW 49.46.130(1) or by the ‘reasonably equivalent’ compensation, the statute [MWA] mandates that truck drivers must obtain extra compensation for hours worked over 40 per week” in *Bostain*, 159 Wn.2d at 710. The Court’s holding is consistent with the policy of the overtime provision, which is to encourage employers to hire more employees by requiring the employer to pay one-half times the employee’s rate of pay, whether hourly or by a piece rate, for hours worked in excess of 40 per week. RCW 49.46.005; *Bostain*, 159 Wn.2d at 712; *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460, 68 S.Ct. 1186, 92 L. Ed. 1502 (1948), *reh’g denied*, 335 U.S. 838; *Walling v. Helmerich & Payne*, 323 U.S. 37, 40, 65 S.Ct. 11, 89 L. Ed. 29 (1944). The purpose of the statute thus is to encourage employers to limit work hours to 40 hours per week by requiring a premium for each hour worked in excess of 40 per week.

The Court’s decision in *Bostain* enforced this policy of the MWA by requiring that the interstate truck drivers receive “extra compensation” for the hours worked in excess of 40 per week. 159 Wn.2d at 710. The MWA does not define what is “reasonably equivalent” to extra

compensation for work over 40 hours per week, and therefore the term has its ordinary meaning. *Burton v. Lehman*, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). “Equivalent” means “equal in value.” Black’s Law Dictionary (6th Ed. 1990, p. 54); American Heritage Dictionary (1981, p. 443). Interstate truck drivers are paid in a variety of ways, *e.g.*, hourly, mileage-rate pay, wait-time pay, etc., and often a truck driver may in a single day be paid in more than one way. The modifier “reasonably” accordingly takes this variety of pay rates for truck drivers into account and allows some leeway in deciding what is equivalent. But the MWA, and the Court’s opinion in *Bostain*, unambiguously require that the interstate truck drivers receive *extra* compensation for the hours worked over 40 per week.

DLI’s view of “reasonably equivalent” does not satisfy this requirement. Under DLI’s approach, an interstate truck driver who works 40 hours per week and an interstate truck driver who works 70 hours per week for the same company are paid at the same per-mile piece rate. The 70-hour driver employed by the company never receives *any extra* pay on the mileage rate for having to work more than 40 hours per week. The 70-hour per week truck driver is always paid at the same mileage rate as the 40-hour per week truck driver employed by the same company.

Using Westberry's pay as an illustration, Westberry received the same base mileage rate of 32 cents per mile (approximately \$16.00 per hour, assuming an average of 50 miles per hour) when he worked 40 hours or less per week and when he worked more than 40 hours per week, as he often did. CP 87. He never received any "additional compensation" when he worked more than 40 hours per week. CP 81; *see also* CP 8, 27.<sup>8</sup>

DLI's approach thus violates the policy of the MWA and the holding in *Bostain* because it does not require that the individual driver such as Westberry who works in excess of 40 hours per week receive any "extra compensation" beyond the same base mileage rate received by the 40-hour-per-week interstate truck driver employed by the company.<sup>9</sup>

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<sup>8</sup> Under DLI's procedure, an employer submits letters with "data," with no verification or examination of facts by DLI, that is not subject to challenge or discovery by employees. The aggregate data supposedly show what the drivers as a group would have earned with a theoretical lower base rate of pay plus an assumed amount of overtime. None of the "data" or the calculations have any relationship to what any specific employee would earn with overtime pay.

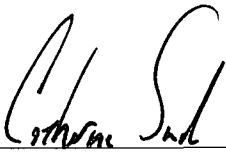
<sup>9</sup> The flaw in DLI's reasonably equivalent approach is particularly acute in its retroactive determinations, such as the one it did for IDC, because DLI does not require the employer to actually have a base rate of pay. WAC 296-128-011 requires that the employer have a "base rate of pay" which "shall be established *in advance of the work performed*." (Emphasis added.) Instead of following its regulation, DLI allowed the employers, including IDC, to retroactively manufacture a lower "base rate of pay" by reasoning backward from what it already had paid its employees, to create a fictional base rate of pay. This fictional base rate of pay was never disclosed to the affected employees, including Palmer, Bellow and Westberry. Nor were the affected employees told the supposed overtime rate, or that their uniform mileage rate of pay supposedly included additional compensation for overtime, as required by WAC 296-128-011. CP 8, 27.

### III. CONCLUSION

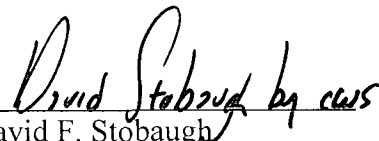
For the reasons set out in this and the opening brief, this Court should reverse.

Dated this 11<sup>th</sup> day of June, 2012.

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### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 11, 2012, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to counsel for the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> E-File <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
David F. Stobaugh Stephen K. Strong Bendich, Stobaugh & Strong, P.C. 701 Fifth Avenue, Suite 6550 Seattle, WA 98104-7062	<input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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**DATED** at Seattle, Washington this 11<sup>th</sup> day of June, 2012.

  
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Victoria K. Isaksen